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USURY: LEGISLATION IN MISSISSIPPI

by
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IN times of "tight money" with its concomitant high interest rates, lenders are faced with the dilemma of providing loans to customers at a profit to themselves while remaining within the constraints imposed by statutory maximum interest rates. One solution to this problem has been the employment of unusual lending techniques. Lenders in Mississippi are generally familiar with these lending techniques such as renegotiable rate mortgages, loans with tax exempt interest income, piggyback notes, wrap-around mortgages, future advances with melded rates, assumptions that do not destroy the marketability of the existing loan, and short-term automatically renewable loans.[1] Techniques might exist that employ combinations or variations of each of the above. Most of these loan techniques are not difficult to employ. The real problems for lenders in Mississippi arise because all variations of loans, regardless of form, are governed by the state's usury provisions. The questions the new variations present are numerous and varied and have not been completely dealt with by the legislature and the courts.

To legally employ the new loan techniques, lenders and their attorneys must look to the principles which have evolved regarding usurious rates. The laws governing permissible interest rates for loans have a long and controversial history that has resulted in a rather complex body of law. This article addresses a narrow area in the law of usury. Its scope is limited to the area of maximum rates allowed by state law and the components considered in the determination of those rates. Both the Mississippi legislature and the United States Congress have passed enactments which fill many voids and provide previously unavailable guidance.

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[1] G. MUNN, ENCYCLOPEDIA OF BANKING AND FINANCE, (7th ed. 1973).

HISTORICAL DEVELOPMENT

Usury is a concept that has been addressed by recorded law dating from early Biblical times.[2] The Biblical proscriptions against usury were not uniformly adhered to in early cultures. Ancient Egyptians' business practices allowed interest charges of up to 30%,[3] and under Roman law an interest rate of up to 50% of profits was accepted procedure as late as A.D. 325.[4] In Europe from A.D. 533 until the Ninth century, interest charges were regulated by the Code of Justinian.[5] These regulations held sway until A.D. 800, the advent of Charlemagne and the ascendance of the influence of the ecclesiastical canons in secular life. Throughout the Middle Ages the Church and its canons on interest and usury dominated secular lending practices. The earliest statutory treatment of the subject of interest rates in England appears in 1197.[6] The Magna Carta contained implicit recognition of these statutory restrictions on the collection of interest.[7] In 1545, Parliament enacted a law regulating interest rates which permitted interest at 10% and provided criminal and civil penalties for violations.[8]

The ecclesiastical and statutory sanctions against usurious rates were even reflected in the secular writings of the period. Early English literature characterized the usurer as a person of low moral fiber. Shakespeare's despicable Shylock is depicted as a loathsome character who enjoyed extracting a pound of flesh in lieu of late payments in *The Merchant of Venice*.[9]

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[2] "If thou lend money to any of my people that is poor by thee, thou shalt not be to him as an usurer, neither shall thou lay upon him usury." *Exodus* 22:25. "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of any thing that is lend upon usury; Unto a stranger thou mayest lend upon usury, but unto thy brother thou shall not lend upon usury." *Deuteronomy* 23:19, 20. "Lord, who shall abide in thy tabernacle?. . .He that putteth not out his money to usury." *Psalms* 15:1, 5.

[3] Hershman, *Usury and the Tight Mortgage Market*, 22 BUS. LAW. 333, 334 (1967). *See also* Riley, *Usury Legislation, Its Effects on the Economy and a Proposal for Reform*, 33 VAND. L. REV. 199, 200 (1980).

[4] "An Historical Review of Interest," in 2 THE WORLD OF BUSINESS 1031 (1962).

[5] By that law persons of illustrious birth were confined to the moderate rate of 4 percent, while 6 was pronounced to be the ordinary and legal standard. For the convenience of manufacturers and merchants 8 percent was allotted; to loans on shipping 12 percent was granted, but except in such 'perilous' business no higher rate than 8 percent was permitted.

Id. The author goes on to point out that these rates were not observed as a matter of course in general business practice. They were probably enacted for the purpose of allowing the Emperor to control the interest rates he was charged by the moneylenders.

[6] *Id.* at 1033.

[7] *Id.*

[8] *Bill Against Usury*, 1545, 37 Hen. 8, c. 9.

[9] "The pound of flesh, which I demand of him is dearly bought, 'tis mine, and I will have it." Shakespeare, *The Merchant of Venice*, Act IV, Sc. 1, line 40 (New Hudson ed.).

In 1713, during the reign of Queen Anne and the settlement of the American Colonies, the statutory maximum rate of interest was reduced to 5%.[10] The Statute of Anne became the model act for the American Colonies and continued in effect after they gained statehood.[11] Although usury provisions remained in effect in the United States on both the state and federal level, by 1876 the British abandoned all usury regulation.[12] The abandonment was encouraged by the efforts of Jeremy Bentham. Bentham's foresighted denouncement, *Letters in Defense of Usury*, propounded the view that interest restrictions on loans were excessive and unnecessary government regulation.[13] The effects of such writings were seen at the turn of the century with the British Parliament's enactment of the Money-Lenders Act of 1900[14] which allowed usurious rates of interest to be adjusted by the Court of Equity when the interest charged was so excessive as to shock the conscience of the Court.[15]

THE ELEMENTS OF USURY

Usury may be defined simply as too much interest. The distinction between the legal and usurious rate is one of quality, or more precisely, "a bargain under which a greater profit than is permitted by law is paid, or is agreed to be paid to a creditor or on behalf of the debtor for a loan of money, or for extending the maturity of a pecuniary debt is usurious and illegal."[16]

In the 1840 case of *Planters' Bank v. Snodgrass*,[17] a usurious bargain in Mississippi was said to consist of "an agreement between the lender and the borrower of money, by which the latter knowingly gives or promises, and the former knowingly takes or reserves, a higher rate of interest than the statute allows, and with an intention to violate the statute."[18] This statement embodies the classic statutory elements of usury. Each element must be present to make out a prima facie case of usury under Mississippi law.

The first element in the *Planters' Bank* definition requires the formation of an agreement.[19] The necessary agreement must be a contract between the borrower and the lender containing either an express or

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[10]*Statute of Anne*, 1713, 12 Anne, c. 16.

[11]Hershman, *supra* note 3, at 334.

[12]*Id.*

[13]J. BENTHAM, *Letters in Defense of Usury*, in WORKS OF JEREMY BENTHAM (1943).

[14]Hershman, *supra* note 3, at 334.

[15]Hershman, *supra* note 3, at 336.

[16]RESTATEMENT OF CONTRACTS § 526 (1932).

[17]5 Miss. (4 Howard) 573 (1840).

[18]*Id.* at 621.

[19]*Id.*

implied condition of repayment of a loan. The "loan" concept has been very important historically in the application of usury laws.[20] If the transaction was held to be a sale or lease, then the advantage gained was held to be legal profit, not interest.[21] However, this concept has been displaced to a great extent by statutory provisions which include "time price differentials" in computations of finance charges.[22] In general, in the absence of an unconditional obligation to pay under a contract, courts deny protection to those who neither pay nor are obligated to pay under the contract of a usurious loan.[23]

The second element of usury given by the *Planters' Bank* case requires a finding of either a stipulation to pay a usurious rate of interest or the actual collection of more interest than the statute allows.[24] In cases where a rate greater than the maximum rate allowed by law was stipulated in the agreement, the court has found the presence of the requisite element although the interest actually paid was within the statute.[25] If the rate stipulated is within the legal rate, but an illegal amount of interest is actually paid, the result is the same; the agreement is usurious. The court will look through such devices as "premiums," commissions, and "bonuses" when the true purpose is to defeat the usury proscriptions.[26] If there is a doubt raised as to whether a usurious rate is either contracted for, or received, that doubt will be resolved by a jury.[27] The party alleging usury must, in a clear, positive

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[20]For an interesting historical distinction between an investment and a loan see Rabinowitz, *The Talmudic Laws Concerning Creditor and Debtor*, 2 THE WORLD OF BUSINESS 1024, 1030 (1962).

[21]*See* Yeager v. Ainsworth, 202 Miss. 747, 760, 32 So. 2d 548, 552 (1947).

[22]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981). The inclusion of time price differentials in the broad category of "finance charges" allows the difference between the cash price of an item and the price charged when the purchase is financed to be included in the overall "cost" of financing. When this cost to the dealer of financing a purchase forms a greater percentage of the amount or item bargained for than the statute allows, the usury provisions are activated.

[23]*See* Byrd v. Newcomb Mill & Lumber Co., 118 Miss. 179, 192-93, 79 So. 100, 101 (1918).

[24]5 Miss. (4 Howard) at 621.

[25]Hardin v. Grenada Bank, 182 Miss. 689, 180 So. 805 (1938); Chandler v. Cooke, 163 Miss. 147, 162, 137 So. 496, 498 (1931). In *Chandler* the court was concerned with the construction of the usury statute language, MISS. CODE ANN. § 1946 (1930). The court took special note of the fact that the statute allowed a finding of usury under either alternative through the use of the conjunction "or." This language is essentially the same as that used in the present statutory version. MISS. CODE ANN. § 75-17-1(11) (Supp. 1981).

[26]Cappert v. Bierman, 339 So. 2d 1355, 1357 (Miss. 1976), (bonus, commission, carrying charge); Hardin v. Grenada Bank, 182 Miss. 689, 708, 180 So. 805, 809-10 (1938), (bonus); Crofton v. New South Bldg. and Loan Ass'n, 77 Miss. 166, 178, 26 So. 362, 363 (1899), (premium).

[27]Morgan V. King, 128 Miss. 401, 409, 91 So. 30, 31 (1922).

and certain manner, show facts to that effect.[28] The highly penal usury statutes are always strictly construed in favor of the creditor.[29] The courts will look through the form or label of the imposed charges to their actual substance in making a determination of whether or not the rate stipulated, or the amount collected, is in fact usurious.[30] If the alleged usurious nature of the agreement results from a mistake of fact, such mistake will serve as a valid excuse or defense.[31] However, only a mistake of fact and not a mistake of law will be accepted as a valid defense.[32]

The third requirement of *Planters' Bank* is that a greater rate of interest must be charged than the law allows.[33] The law with respect to the legal maximum rate of interest is statutory. However, problems in calculation do arise when the courts attempt to determine whether charges to the borrower are in fact finance charges or interest.[34] Section 75-17-1(9) of the Mississippi Code now defines various finance charges, but leaves the status of many charges to the wisdom of the courts.[35]

The fourth and final element of usury used and discussed in *Planters' Bank* is intent to violate the law.[36] When an illegal rate of interest appears on the face of the contract, intent is established unless it can be shown to be the result of a mistake of fact.[37] The statute condemns the usurious contract, not just the collection of the usurious charge.[38] To be guilty of usury, one need only intentionally do what the statute

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[28]Byrd v. Newcomb Mill & Lumber Co., 118 Miss. 179, 79 So. 100 (1918).

[29]When the courts have referred to the penal nature of the sanctions for usury, it has generally been in reference to those provisions for forfeiture of principal as well as interest. However, upon occasion the court has referred to the general penal nature of the usury laws. *See* Planters' Bank v. Snodgrass, 5 Miss. (4 Howard) 573, 621 (1840).

[30]Ready-Mix Concrete & Prod. Co. v. Perry, 239 Miss. 329, 342, 123 So. 2d 241, 246 (1960); Tower Underwriters, Inc. v. Lott, 210 Miss. 389, 397-98 49 So. 2d 704, 710 (1951); Yeager v. Ainsworth, 202 Miss. 747, 762, 32 So. 2d 548, 553 (1947).

[31]Patterson v. McClintlock, Inc., 201 Miss. 107, 112, 28 So. 2d 737, 737 (1947).

[32]*Id.*; Jones v. Hernando Bank, 194 Miss. 474, 478, 13 So. 2d 31, 32 (1943); Jefferson Standard Life Ins. Co. v. Davis, 173 Miss. 854, 859-60, 163 So. 506, 507 (1935), Smythe v. Allen, 67 Miss. 146, 150, 6 So. 627, 628 (1889).

[33]5 Miss. (4 Howard) at 621.

[34]Cappert v. Bierman, 339 So. 2d 1355, 1357 (Miss. 1976); Dickey v. Bank of Clarksdale, 183 Miss. 748, 761, 184 So. 314, 316 (1938); Mississippi Power & Light Co. v. A.E. Kusterer & Co., 156 Miss. 22, 23, 125 So. 429, 432 (1930).

[35]The term *finance charge* has become synonymous with the term *interest* in the discussion of usury law. Hereinafter the two terms will be used interchangeably. See note 129 infra.

[36]5 Miss. (4 Howard) at 622-23.

[37]*Id. See also* Jefferson Standard Life Ins. Co. v. Davis, 173 Miss. 854, 859-60, 163 So. 506, 507 (1935).

[38]Jefferson Standard Life Ins. Co. v. Davis, 173 Miss. 854, 859, 163 So. 506, 507 (1935).

prohibits.[39] As the court in *Chandler v. Cooke*[40] commented, "Innocent ignorance is just as fatal . . . as conscious wrongdoing."[41]

FEDERAL USURY LEGISLATION

The first federal activity in usury law occurred in 1864 when Congress enacted the National Bank Act.[42] The act fixed the usury rate to correlate with the rate allowed by the laws of the state in which the lending bank was located. It provided that if no rate was fixed by the state, the legal rate would be 7%.[43] Included in the National Bank Act was a section which worked a forfeiture on usurious charges in an action in the nature of a debt.[44] The act was amended in 1933 to allow national banks to charge either a rate of interest set by the state, or 1% plus the discount rate on 90-day commercial paper at Federal Reserve banks in the reserve district where the bank was located, unless the state had limited the rate chargeable by its state-chartered banks.[45] In 1935, the act was amended in its application to regulated banks outside the United States. Their maximum rates of interest were determined by the rate allowed by the laws of the political subdivision in which the bank was located.[46]

Federal activity recently occurred with a major piece of legislation which preempted state usury statutes and allowed an increase in permissible interest rates charged on loans by national banks and other federally insured financial institutions.[47] The legislation also amended the Federal Deposit Insurance Act,[48] the National Housing Act,[49] and the Small Business Investment Act[50] as they related to state usury ceilings on business loans. On loans of $25,000 or more which fell within the bounds of the act, the amendment set a new rate of interest at 5% plus the Federal Reserve discount rate[51] for insured bank loans made

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[39]Chandler v. Cooke, 163 Miss. 147, 161, 137 So. 496, 498 (1931); Hebron Bank v. Gambrell, 116 Miss. 343, 348, 77 So. 148, 149 (1918).

[40]163 Miss. 147, 161, 137 So. 496, 498 (1931).

[41]*Id.* at 161, 137 So. at 498.

[42]Ch. 106, § 30, 13 Stat. 108 (1864) (current version at 12 U.S.C. § 85 (Supp. IV 1980)).

[43]*Id.*

[44]*Id.* (current version at 12 U.S.C. § 86a(c) (Supp. IV 1980)).

[45]Banking Act of 1933, ch. 89, § 25, 48 Stat. 191 (1933) (current version at 12 U.S.C. § 85 (Supp. IV. 1980)).

[46]Banking Act of 1935, ch. 614, § 314, 49 Stat. 711 (1935) (current version at 12 U.S.C. § 85 (Supp. IV 1980)).

[47]Interest Rate Amendments Regarding State Usury Ceilings on Business Loans, Pub. L. No. 93-501, § 201, 88 Stat. 1558 (1974).

[48]12 U.S.C. §§ 1811-1832 (1976 & Supp. IV 1980).

[49]12 U.S.C. §§ 1724-1730g (1976 & Supp. IV 1980).

[50]15 U.S.C. §§ 661-687j (1976 & Supp. IV 1980).

[51]Federal Reserve discount rate as used here means the discount rate on 90-day com-

for business or agricultural purposes.[52] This effectively preempted the applicable rate prescribed by individual states. Prior to passage of this act, many state-chartered banks were caught in a squeeze when market interest rates rose above the state statutory levels. At the time the legislation went into effect, the Federal discount rate was 13%,[53] considerably above many state usury law ceilings. The federal act made it possible for state banks to compete with national banks and other institutions which had previously been able to charge higher rates of interest than could state banks. The relief provided by the series of amendments was short-lived. The increased levels expired on July 1, 1977, or when a state enacted laws which prohibited the charging of interest at the rates provided in the amendment.[54]

The continued shortage of available lending money, attributed to the lower state usury ceilings following the extinction of the 1974 act, prompted similar Congressional action again in 1979.[55] The measure provided only temporary relief since it expired on July 1, 1981.[56]

The Depository Institutions Deregulation and Monetary Control Act

The most recent federal activity in the area of usury legislation took place on March 31, 1980, when the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDaMCA) was enacted.[57] Title V of the rather lengthy and complex act has substantially relaxed and replaced state usury laws and constitutional provisions affecting residential, business and agricultural loans.[58]

Residential Loans. Under DIDaMCA, state limitations of rates of interest, discount points, finance charges or other charges which may be charged, received or reserved do not apply to obligations which are secured by residences.[59] The loans, mortgages, credit sales, and advances affected by the act are those which are secured by a first lien

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mercial paper that is in effect at the Federal Reserve bank in the district where the lender is located. *See* 12 U.S.C. § 357 (1976).

[52]12 U.S.C. v 1831a (1976) (repealed 1980).

[53]The effective date of the legislation was October 29, 1974.

[54]Interest Rate Amendments Regarding State Usury on Business Loans, Pub. L. No. 93-501, § 206, 88 Stat. 1560 (1974).

[55]Interest Rate Amendments Regarding State Usury Ceilings on Certain Loans, Pub. L. No. 96-161, 93 Stat. 1235 (1979).

[56]*Id.* § 207.

[57]Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified in scattered sections of 12, 15 U.S.C.).

[58]Congress has the power to preempt state usury legislation through the combined effect of the supremacy clause, U.S. CONST., art. 6, cl. 2, and the commerce clause, U.S. CONST., art. 1, § 8, cl. 3; Stephens Sec. Bank v. Eppivic Corp., 411 F. Supp. 61 (W.D. Ark. 1976); McInnis v. Cooper Comm., Inc., 611 S.W.2d 767 (Ark. 1981).

[59]12 U.S.C. § 1735f-7 (Supp. IV 1980),.

on residential real property, a first lien on residential manufactured homes,[60] or a first lien on all stock allocated to a unit in a residential cooperative housing corporation.[61] The provisions of the act are to apply to obligations described under its provisions if made on or after April 1, 1980.[62] The act permanently preempts state provisions but does not provide a federally imposed ceiling, allowing such rates to be dictated by the market. However, state activity in the area is expressly allowed by the provisions of the act.[63] For a three year period beginning in April, 1980, states may override this preemption and such would be effective as of the date of adoption or certification.[64] The provisions of the act do not apply to the sale of a residential manufactured home unless the terms of the sale comply with consumer protection provisions regarding balloon payments, payment penalties, late charges, default fees, 30-day notice prior to institution of any action leading to repossession or foreclosure action[65] and other such provisions as prescribed by the Federal Home Loan Bank Board.[66] Loans qualifying for the act's preemption of usury ceilings imposed by state law include those of owner-financed sales of an individual's principal residence,[67] federal creditors,[68] creditors making federally related loans,[69] and any creditor defined in the Truth in Lending Act[70] who makes or

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[60]The term refers to a manufactured home as defined in 42 U.S.C. § 5402 (6) (Supp. IV 1980) which is used as a residence, DIDaMCA, § 501(e)(4), 94 Stat. 163 (1980) (identical language appears in 12 U.S.C. § 1735f-7 note (Supp. IV 1980)).

[61]§ 501(a)(1) (identical language appears in 12 U.S.C. § 1735f-7 note (Supp. IV 1980)).

[62]§ 501(b)(1).

[63]§ 501(b)(2) (identical language appears in 12 U.S.C. § 1735f-7 note (Supp. IV 1980)).

[64]*Id.* Provisions of preemption will continue to apply to credit transactions made pursuant to a committment entered into or a "rollover" loan made or committed in the interim of April 1, 1980, and the effective date of the state's override legislation. § 501 (b)(3) (identical language appears in 12 U.S.C. § 1735f-7 note (Supp. IV 1980)). The Joint Explanatory Statement of the Committee of Conference, H. R. Rep. No. 842, 96th Cong. 2d Sess. 79, *reprinted in* [1980] U.S. CODE CONG. & ADMIN. NEWS, 298, 309, sets out requirements for state action to override. The Mississippi 1980 usury legislation specifically declined to override this preemption. *See* note 110 and accompanying text.

[65]Except where there is abandonment or other extreme circumstances, § 501(c)(2).

[66]§ 501(c)(1)-(4).

[67]This class of creditors was absent from the original act and was added by amendments contained in the Housing and Community Development Act of 1980, Pub. L. No. 96-399, §§ 308 (c)(6), 324 (a),(e), 94 Stat. 1641, 1647, 1648 (1980).

[68]Including: 1) a lender whose accounts or deposits are federally insured; 2) a lender who is regulated by any federal agency; 3) a lender who has received approval for participation in any mortgage insurance program under the National Housing Act. § 501(a)(1)(C) with reference to 12 U.S.C. § 1735f-5(b) (1976).

[69]Including: 1) those made in whole or part, or insured, guaranteed, supplemented or assisted in any way by the Secretary of Housing and Urban Development or any other federal officer or agency; 2) those made in connection with certain programs of HUD or a housing program administered by any federal officer or agency. § 501(a)(1)(C) with reference to 12 U.S.C. § 1735f-5(b) (1976).

[70]15 U.S.C. § 1602f (Supp. IV 1980).

invests in residential real estate loans totaling $1,000,000 or more per year.[71]

Business and Agricultural Loans. The DIDaMCA preemption applies to particular loans in the area of business and agriculture as well. As originally enacted, the act permitted rates exceeding the applicable state rate when the amount of the business or agricultural loan exceeded $25,000.[72] The act has been subsequently amended and the loan qualification has been lowered to any amount in excess of $1,000.[73] Unlike the previous section regarding loans secured by residences, a federal ceiling exists for business and agricultural loans. The interest rate cannot exceed 5% in excess of the discount rate, including any surcharge, on 90-day commercial paper.[74] A charge in excess of the federally permitted rate where state law remains preempted results in a forfeiture of the entire interest.[75] The debtor may recover from the creditor double the amount of interest paid.[76] Like the preceding section on residential loans, states may choose to override the federal preemption. Unlike the prior section, this preemption is temporary and will terminate on April 1, 1983 regardless of the states' actions.[77]

Other Loans. Title V of DIDaMCA also amends the Federal Deposit Insurance Act,[78] the National Housing Act,[79] the Federal Credit Union Act,[80] and the Small Business Investment Act of 1958.[81] The amendments preempt state law or constitutional provisions limiting the rate of interest that may be charged by state-chartered insured banks, insured savings banks and mutual savings banks, insured credit unions, and insured branches of foreign banks. The new interest ceiling for these institutions is the greater of: 1% in excess of the federal discount rate, surcharge not included, on 90-day commercial paper in effect at the Federal Reserve bank in the district where such institution is located, *or* the rate allowed by the laws of the state where the institution is located.[82] This preemption is permanent unless specifically overridden

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[71]This requirement does not apply to a lender selling residential manufactured homes financed by loans secured by first liens on such if the lender has an arrangement to sell or in fact sells such loans to an institution that qualifies as creditor under the act. § 501 (a)(1)(C)(v).

[72]§ 511(a) (current version at 12 U.S.C. § 86a (Supp. IV 1980)).

[73]12 U.S.C. § 86a (Supp. IV 1980).

[74]12 U.S.C. § 86a(a) (Supp. IV 1980).

[75]12 U.S.C. § 86a(c) (Supp. IV 1980).

[76]*Id.* This action must be filed within two years of the payment of the usurious rate.

[77]§ 512 (identical language appears in 12 U.S.C. § 86a note. (Supp. IV 1980)).

[78]12 U.S.C. § 1831d (Supp. IV 1980).

[79]12 U.S.C. § 1730g (Supp. IV 1980).

[80]12 U.S.C. § 1785g (Supp. IV 1980).

[81]15 U.S.C. § 687(i) (Supp. IV 1980).

[82]12 U.S.C. § 1831d(a) (Supp. IV 1980); 12 U.S.C. § 1730g(a) (Supp. IV 1980); 12 U.S.C. § 1785g(1) (Supp. IV 1980).

by state action.[83] The ceiling imposed on business loans made by small business investment companies is determined by ascertaining the lowest of the maximum rate described in the Small Business Administration regulations, or the maximum rate authorized by state law, or 1% above the federal discount rate on 90-day commercial paper.[84] State laws or constitutional provisions relating to business loans made by small business investment companies are preempted from April 1, 1980, until the state explicitly overrides the preceding provisions.[85] As with the preceding section on business and agricultural loans, if the states' laws remain preempted and the rate of interest charged is in excess of that permitted by the federal law, a penalty of a forfeiture of the entire interest is imposed.[86] Additionally, the debtor is allowed to sue the creditor for recovery of double the amount of interest paid if the action is filed within two years of the payment.[87]

MISSISSIPPI USURY LEGISLATION

Although the federal authority in the area of usury regulation is quite broad, the state regulations are not totally impotent. As a result of the various "self destruct" provisions of the DIDaMCA allowing states to override the federal provisions[88] and Congress' historical penchant to amend the National Bank Act, the state usury acts remain viable.

Mississippi's usury statute dates back to the state's territorial days.[89] The maximum rate of interest was set at 5% per annum with the penalty for violation being forfeiture of the principal and interest, such sum to be divided equally between the territory treasury and the informer.[90] Interest rates were raised to 6% in 1805.[91] This rate was raised briefly to 8%[92] with a 10% contract rate but was soon returned to the 6% rate with 8% allowable under a contractural agreement.[93] For almost seventy years these interest limitations were unchanged.[94]

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[83] § 525 (identical language appears in 12 U.S.C. § 1730g note (Supp. IV 1980)).

[84] 15 U.S.C. § 687(i)(2) (Supp. IV 1980).

[85] 15 U.S.C. § 687(i)(3) (Supp. IV 1980).

[86] 12 U.S.C. § 1831d(b) (Supp. IV 1980); 12 U.S.C. 1730g(b) (Supp. IV 1980); 12 U.S.C. § 1785g(2) (Supp. IV 1980), 15 U.S.C. § 687(i)(4)4(4) (Supp. IV 1980).

[87] *Id.*.

[88] See notes 64, 77 and 83 and accompanying text.

[89] 1801 Miss. Territorial Laws, *An Act Against Usury*, 1st Assembly, 1st and 2nd Session, at 11.

[90] *Id.* at 12.

[91] MISS. CODE, ch. 47 (1848).

[92] MISS. CODE, ch. 47, art. 3 (1848).

[93] MISS. CODE, ch. 47 art. 6 (1848).

[94] MISS. CODE, art. 1, 2, ch. 50 (1857); MISS. CODE, art. 1, ch. 51, § 2279 (1871); MISS. CODE, ch. 41, § 1141 (1880); MISS. CODE, ch. 66, § 2348 (1892); MISS. CODE, ch. 70, § 2678 (1906).

An amendment to the 1906 statute, effective as of 1913, actually reduced the contract rate to 8%.[95] The amendment also provided that if a rate greater than 20% was involved, not only all interest, but also the principal would be forfeited.[96] The 1913 rate endured for more than fifty years.[97] In contrast with the relatively recent flurry of legislative activity, it is interesting that for almost 120 years Mississippi's usury standard remained unchanged other than this one reduction.

In 1966 the usury statute was amended "to encourage commerce and industry,"[98] by allowing domestic or foreign corporations to agree to pay rates of interest in excess of the maximum prescribed rate, within limitations set out in the statute.[99] The usury section appeared in the 1972 Mississippi Code in the same form as the 1966 enactment.[100] An amendment in 1972 allowed non-profit corporations connected with educational facilities or functions to agree to pay a higher rate of interest within limitations similar to those placed on corporations in 1966.[101] In 1973 a similar amendment extended the right to

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[95]1912 MISS. LAWS, ch. 229.

[96]*Id.*

[97]MISS. CODE, § 2075 (1917); MISS. CODE, § 1946 (1930); MISS. CODE, § 36 (1942).

[98]1966 MISS. LAWS, ch. 317.

[99]MISS. CODE ANN. § 75-17-1 (1972) states:

> [A]ny domestic or foreign corporation organized for profit may agree to pay any rate of interest in excess of the maximum rate provided in this section, but not to exceed fifteen precentum (15%) per annum on any contract or other obligation under which the principal balance to be repaid shall originally exceed twenty-five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed twenty-five hundred dollars ($2,500.00), or any extention of renewal thereof, and, as to any such agreement, the claim or defense of usury by such corporation, its successors, grantors, assigns or anyone on its behalf is prohibited.

The cases of Ready-Mix Concrete Prod. Co. v. Perry, 239 Miss. 329, 123 So. 2d 241 (1960) and Richardson v. Courtner, 232 Miss. 885, 109 So. 2d 854 (Miss. 1958) stand for the principle that in determining whether a transaction is tainted with usury, the court will look through the form to the substance. Here, borrowers could argue that the formation of a corporation for the sole purpose of taking advantage of the provisions to allow higher rates of interest to be charged would merely be a "device to avoid usury."

[100]MISS. CODE ANN. § 75-17-1 (1972).

[101]1972 MISS. LAWS, ch. 436 states:

> [A]ny nonprofit corporation organized to own, operate, or finance any educational facility or function, may agree to pay any rate of interest, in excess of the maximum rate provided in this section, but not to exceed twelve percent (12%) per annum on any contract or other obligation under which the principal balance to be repaid shall originally exceed Twenty-five Hundred Dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed Twenty-five Hundred Dollars ($2,500.00), or on any extension or renewal thereof, and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns or anyone on its behalf is prohibited.

exceed the usual rate to limited and general partnerships.[102] This right to borrow was limited in scope in that it did not extend to financing associated with agricultural products.[103]

In 1974 the usury section was drastically amended by the legislature.[104] The amendment was timed to go into effect July 1, 1974, to coordinate with the federal interest limitation "relief" amendments.[105] The amended version boosted the contract rate for financing to 10% for individual borrowers and 15% for most corporate and partnership borrowers.[106]

One of the most helpful provisions of the 1974 amendment was a definition of the ambiguous term "finance charge."[107] The amendment recited a dozen different types of charges by a lender that must be included in the term, and expressly excluded eight other charges as "finance charges."[108]

The 1980 Interest Rate Bill

On May 13, 1980, Governor William Winter signed into law a bill effective as of that day which amended §§ 63-19-43, 75-17-1, 75-67-39, and 81-13-39 of the Mississippi Code.[109] The timing of this bill with the April 1, 1980, federal usury preemption legislation was no coincidence but was dictated by rapidly increasing interest rates affecting the entire nation.

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[102] 1973 MISS. LAWS, ch. 387 states:

> [A]ny limited partnership or general partnership may agree to pay any rate of interest in excess of the maximum rate provided in this section but not to exceed fifteen percent (15%) per annum on any contract or other obligation under which the principal balance to be repaid shall originally exceed Two Hundred Fifty Thousand Dollars ($250,000.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally contracted in writing to be advanced shall exceed Two Hundred Fifty Thousand Dollars ($250,000.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such individual, limited partnership, general partnership or his successors, assigns, or anyone on his behalf is prohibited. This paragraph shall not apply to any contract or other obligation relating to the purchase of agricultural lands or secured by security instrument on agricultural lands or the financing of the production of agricultural products or livestock, agricultural processing or other manufacturing businesses, or to any obligation other than interim construction financing having an original maturity of less than ten years.

[103] *Id.*

[104] 1974 MISS. LAWS, ch. 564. The legislative purpose behind this act was expressed in its official title: "An Act to simplify and modernize the laws governing the lending of money. . . ."

[105] See note 47 and accompanying text.

[106] 1974 MISS. LAWS, ch. 564.

[107] 1974 MISS. LAWS, ch. 564. sect. 9. This is essentially the same definition of "finance charge" found in MISS. CODE ANN. § 75-17-1(9) (Supp. 1981). The present code section adds "time price differential" to the definiton of "finance charges."

[108] *Id.*

[109] 1980 MISS. LAWS, ch. 492.

The fact that Mississippi's legislature did not override the previous month's federal preemption law, as it was expressly allowed to do, is highly significant. A last-minute amendment by the state legislature provided that "the preemption of state law provided by DIDaMCA shall remain in full force and effect in the State of Mississippi."[110] Legislators had become aware of the importance of the ability of lenders to make market rate loans.[111]

The Mississippi Code, as amended, raised the legal rate of interest to 8% per annum through June 30, 1982, and 6% per annum thereafter.[112] The "contract rate" of interest was raised to 10%.[113] The parties contracting for a rate of interest are given a certain degree of flexibility by the Code's allowance of an alternative contract rate of interest not to exceed 5% per annum above the federal discount rate, not including any surcharge.[114] This alternative contract rate of interest is available until June 30, 1982.[115]

Borrowers who are partnerships, joint ventures, religious societies, unincorporated associations, or domestic or foreign corporations, whether for profit or nonprofit, can agree to pay a maximum legal yield of the greater of 15%, or, until June 30, 1982, 5% above the federal discount rate, provided the original loan principal exceeds $2,500.[116] After that date, the maximum rate becomes 15%.[117]

On a loan secured by residential real estate, as defined in sub-section (4) of the new usury provision,[118] any borrower may pay a finance charge not exceeding the greater of 10%, or until June 30, 1982, 5% above the index of market yields of the monthly twenty-year constant maturity index of Long Term United States Government Bond Yields.[119]

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[110] *Id.* at section 7.

[111] Interview with Representative John Hampton Stennis, Chairman of the Committee of Banks and Banking in Jackson, Mississippi (May 21, 1980).

[112] MISS. CODE ANN. § 75-17-1(1) (Supp. 1981).

[113] MISS. CODE ANN. § 75-17-1(2) (Supp. 1981).

[114] *Id.*

[115] *Id.*

[116] MISS. CODE ANN. § 75-17-1(3) (Supp. 1981). The $2,500 amount specified in this section may be determined on the basis of one loan of that amount, or of a series of loans whose aggregate principal, agreed upon in advance, exceeds the $2,500 threshold.

[117] MISS. CODE ANN. § 75-17-1(3) (Supp. 1981).

[118] MISS. CODE ANN. § 75-17-1(4) provides the following definition of "residential real property":

> The term "residential real property," as used in this subsection, means real estate upon which there is located or to be located a structure or structures designed in whole or in part for residential use, or which comprises or includes one or more apartments, condominium units or other dwelling units.

[119] MISS. CODE ANN. § 75-17-1(4) (Supp. 1981). It should be noted that this section applies only to residential real estate. It seems that unless otherwise provided for, interest on commercial real estate loans is governed by the provisions of section (2).

Retailers and credit card issuers received a ¼% per month increase to 1¾% through June 30, 1982, for unpaid balances of revolving credit agreements.[120] As of June 30, 1982, the interest rates on these accounts are based on a graduated rate keyed to the amount of the unpaid balance.[121] A new sub-section permits retail sellers to receive up to 24% for "closed-end" credit sales on amounts financed up to $2,500 and up to 21% on balances greater than $2,500.[122]

The new Code provisions also set new rates for licensees under the Small Loan Regulatory Law and Small Loan Privilege Tax Law.[123] These new rates are set on a graduated scale: 36% on loans not greater than $800, 33% for that portion of unpaid balances between $800 and $1,800, 24% from $1,800 to $4,500, and 12% for that portion exceeding $4,500.[124] A new provision in this sub-section permits these rates to be increased by the percentage that the Federal Reserve discount rate exceeds 9% on loans of less than $800, and the percentage that the Federal Reserve rate exceeds 10% for such portion of loans exceeding $800.[125]

The sub-section pertaining to mobile homes[126] was amended to allow loans under $1,000 to bear a 25% finance charge; the unpaid balance from $1,000 to $2,500 to bear 13%, and that portion of the unpaid balance over $2,500 to bear a 15% finance charge. Through June 30, 1982, loans on amounts greater than $2,500 may result in yields no greater than 5% plus the Federal Reserve discount rate.[127]

The most drastic alterations in the usury laws appear in sub-section (9) which defines the term "finance charge."[128] It codifies the finance

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[120]MISS. CODE ANN. § 75-17-1(5) (Supp. 1981).

[121]The graduated rates are shown below:

Unpaid Balance	Interest Rate
$0 - $800	1½%
$800 - $1,200	1¼%
$1,200 and above	1%

[122]MISS. CODE ANN. § 75-17-1(6) (Supp. 1981). This higher rate of allowable finance charges on closed-end financing of retail goods is offset to a considerable degree by the inclusion of time price differentials in the category of "finance charges," MISS. CODE ANN. § 75-17-1(9), thus subjecting them to scrutiny under the maximum interest regulations. *See* Yeager v. Ainsworth, 202 Miss. 747, 760, 32 So. 2d 548, 552 (1947).

[123]MISS. CODE ANN. § 75-17-1(7) (Supp. 1981).

[124]*Id.*

[125]*Id.*. An editor's note to the Code following the 1980 amendment expressly states that the late payment penalties in subsection (10) of § 75-17-1 are not to be construed as superseding § 75-17-15, which prescribes a late charge for small loan licensees, and is a "specific statute controlling a specific type of transaction." MISS. CODE ANN. § 75-17-1 (Supp. 1981).

[126]MISS. CODE ANN. § 75-17-1(8) (Supp. 1981).

[127]*Id.*

[128]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981).

In 1980 MISS. LAWS, ch. 491, sec. 1, the wording of § 75-17-1(9) places a comma between "time price differential" and "finders fees," thus clearly enunciating the terms

charge *includables*[129] and *excludables*.[130]

Even though many charges involved in money lending transactions are listed by name, the act has not resolved all the problems inherent in determining what is "interest." Some charges, such as time price differentials and discounts, have widely accepted definitions. However, one lender's "loan fees" are another lender's "transaction charges." It remains the responsibility of the lender to determine whether a fee or charge falls within the statutory definition of "finance charge." The finance charge, as defined by the act, "means the amount or the rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit."[131] "Interest," a term seemingly identical to the term "finance charge" has been defined as "compensation allowed by law, or fixed by the parties, for the use of forbearance of money."[132]

Although subjected to close scrutiny by the courts, finder's fees and brokerage fees have historically been excluded from compuation of finance charges.[133] The courts have not blithely accepted the characterization of such items as "fees." In transactions where the "actual lender, in order to evade the [usury] statute, pretends to act as an agent or broker and exacts a commission for his supposed service . . .,the court, upon proof of the deceptive character of the transaction, will declare it

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as separate and distinct lending charge techniques. The codified version of MISS. CODE ANN. § 75-17-1(9) (Supp. 1981) omits this comma, with the result that "time price differential" *modifies* "finders fees." A literal interpretation of the codified version would remove the time price differential, as well as normally understood finders fees, from the definition of finance charges, and leave in their place a new type of finders fees whose nature is unclear. For the purposes of this article, it is assumed that the version of the act appearing in 1980 MISS. LAWS, ch. 492, is correct.

[129]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981) lists the following items as *includables*: interest, brokerage fees, finance charges, carrying charges, activity charges, time price differential, finders fees, and other cost or expense to the debtor related to making the loan. This last item is probably intended to encompass the origination fee.

[130]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981) specifically exempts the following items from classification as finance charges: recording fees, motor vehicle title fees, and bona fide closing costs and appraisal fees incurred in connection with a loan secured by an interest in land, as well as insurance premiums and other fees.

15 U.S.C. § 1605(b)(1) (1976) provides that charges or premiums for credit life insurance are not includable in the finance charge if the insurance coverage is not a condition for approval by the creditor and this fact is conspicuously disclosed to the customer.

MISS. CODE ANN. § 79-7-7 (1972) defines these other fees as "such reasonable fees or charges as may be necessary to cover the actual cost of handling, processing and investigating" applications from any person, corporation or association for any loan of money or extension of credit from a state-chartered small business investment company.

[131]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981).

[132]Mississippi Power & Light Co. v. A. E. Kusterer & Co., 156 Miss. 22, 34, 125 So. 429, 432 (1930).

[133]Allen v. Grenada Bank, 160 Miss. 419, 133 So. 648 (1931).

usurious."[134] The problem was laid to rest when the 1974 amendment[135] declared broker's fees to be finance charges.

Service charges have long been found to be an element of the "finance charge" in Mississippi. In the 1938 case of *Dickey v. Bank of Clarksdale*,[136] the Mississippi Supreme Court described a service charge as "something which the bank requires the borrower to pay in order to have the loan or accommodation, and, therefore, it is interest under another name."[137] Similar charges include loan fees, transaction charges, activity fees, and carrying charges; all relate to charges by the lender made to absorb the cost of processing the loan.

The time price differential has undergone more change than any other finance charge. Historically, the difference in a cash price and a time price in conditional sales contracts was not considered within the purview of the usury statute.[138] The Mississippi Supreme Court has held that the "principle is well established by the decisions of this court that, where property is sold on credit, the fact that the difference between the credit price and the cash price exceeds the percentage permitted by the usury laws will not render a transaction usurious if the parties acted in good faith."[139] This application of time price differential was reaffirmed as late as June 15, 1979, in *Agristor Credit Corp. v. Lewellen*.[140] In applying Mississippi law, the federal district court held that, even if the retail installment contract was deemed to be usurious, the common law of Mississippi took the transaction out of the usury statute. The court indicated its belief that the legislature could hardly have overlooked this "firm tradition in Mississippi finance law" and had not acted "to obliterate the time price doctrine from Mississippi jurisprudence."[141] With the addition of the time price differential term in sub-section "9"[142] this case would now probably reach the opposite result.

The language of the statute does not specify which charges by the lender are to be included in computing the finance charge. "[A]ny other cost or expense to the debtor for sevices rendered or to be rendered to the debtor in making, arranging, or negotiating a loan of money or an extension of credit and for the accounting, guaranteeing, endorsing, collecting and other actual services rendered by the lender" is a finance charge.[143] Other charges included in the act's definition of fi-

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[134]Tower Underwriters, Inc. v. Lott, 210 Miss. 389, 401-02, 49 So. 2d 704, 709-10 (1951).

[135]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981).

[136]183 Miss. 748, 184 So. 314 (1938).

[137]*Id.* at 761-62, 184 So. at 316.

[138]Yeager v. Ainsworth, 202 Miss. 747, 757, 32 So. 2d 548, 552-53 (1947).

[139]Bryant v. Securities Inv. Co., 233 Miss. 740, 744, 102 So. 2d 701, 702 (1958).

[140]472 F. Supp. 46 (N.D. Miss. 1979).

[141]*Id.* at 50.

[142]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981).

[143]*Id.*

nance charges (loan fees, transaction charges, activity charges and carrying charges) have no meaning in Mississippi statute or case law. Most are probably other names for the well-known "origination fee" which is a finance charge.

Although not mentioned by name in the act, commitment fees[144] are established charges of many lenders nationwide. Some courts have held that commitment fees "merely purchase an option which permits the borrower to enter into the loan in the future. [citations omitted] It entitles a borrower to a distinctly separate and additional consideration apart from the lending of money. Therefore, the lender may charge extra for this consideration without violating the usury laws."[145] The Arizona Supreme Court, in the case of *Altherr v. Wilshire Mortgage Corp.*,[146] discussed the nature of commitment fees and noted that determining whether a commitment fee was a legal charge as opposed to a cloak for usury required an "ad hoc" approach.[147] It listed three pertinent factors for consideration in the determination of the legality of a commitment fee: "tightness or looseness of money, amount of the fee, [and the] rate prevailing in the short term money market where the lender might keep the funds while waiting for the borrower to call for the loans."[148]

The Mississippi Supreme Court has not ruled on the point, but any fees which are called commitment fees, but are in fact other charges not relating to the promise to make the loan, will probably be held to be finance charges, particularly in view of the language of the amendment to the general usury statute.[149] In *Arkansas Savings and Loan Association v. Mack Trucks of Arkansas, Inc.*,[150] the Arkansas Supreme Court used a two-pronged test in determining whether certain additional charges constitute interest or a bona fide commitment fee.[151] First, an extra charge is interest if it depends upon a contingency not within the control of the debtor. Second, a charge imposed upon the borrower which in fact constitutes the lender's expense or costs of doing business is considered interest. Noting the lender charged the 1% fee on all its loans, the court determined that the fee was no more than

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[144]Paying a commitment fee guarantees the ability to borrow a sum of money at a later date at a specific interest rate for a specific term. D & M Dev. Co. v. Sherwood and Roberts, Inc., 93 Idaho 200, 457 P.2d 439, 445 (1969). *See also* Gonzales County Sav. and Loan Ass'n v. Freeman, 534 S.W.2d 903 (Tex. 1976).

[145]534 S.W.2d at 906; *See also* Financial Fed. Sav. and Loan Ass'n v. Burleigh House, Inc., 305 So. 2d 59 (Fla. App. 1975).

[146]104 Ariz. 59, 448 P.2d 859 (1968).

[147]*Id.* at 64, 448 P.2d at 864.

[148]*Id.*

[149]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981).

[150]263 Ark. 516, 566 S.W.2d 128 (1978).

[151]*Id.* at 518, 566 S.W.2d at 130.

a collection of the lender's overhead, thus failing the second part of the test.[152]

Another important alteration in this sub-section allows the lender to calculate the finance charge "on the assumption that the indebtedness will be discharged when it becomes due."[153] Prepayment penalties and statutory default charges are excluded from finance charges.[154] The assumption of timely payment is important because it prevents lenders from stipulating usury in a loan agreement where finance charges are collected at loan closing. For example, a lender's attorney could draft a note due in one year on which the applicable maximum finance charge is 15% and the contract rate for interest shown on the face of the note is 13%. If the lender collected a 1% origination fee and 1% discount, and the note by its terms could be prepaid with a penalty if the borrower prepaid within six months, the total finance charges required by the loan agreement could result in a stipulation for a per annum yield to the lender of 17%. Even with the two point finance charge collected when the loan was disbursed, it would seem that, with the assumption timely payment, the loan agreement will be prevented from being a usurious stipulation even though by its terms the annual yield would exceed the maximum allowable rate.[155] The acceleration of a debt pursuant to a provision of the loan contract which could result in excessive yields is provided with similar protection. In both instances, the lender should take care that the total interest received, plus other includable finance charges, result in a legally allowable per annum yield.

The 1980 legislation which established Mississippi's present interest rate provisions was introduced in the House as House Bill No. 469.[156] The amended Senate version of the bill[157] contained a provision de-

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[152]*Id.*

[153]MISS. CODE ANN. § 75-17-1(9) (Supp. 1981).

[154]*Id.*

[155]Assume a $1,000 loan, at 13% per annum interest, with a 1% discount and a 1% origination fee collected in advance.

	$1,000	loan
(less)	10	1% discount
(less)	10	1% origination fee
	$ 980	Cash disbursed to borrower

If the loan is repaid in 6 months, the interest payable would be $65. (13% x 6/12 x $1,000). Thus the total amount of finance charges on the loan would equal $85.

$10	1% discount
$10	1% origination fee
$65	interest
$85	

$85 represents 17% of the $1,000 originally borrowed and therefore would result in a usurious rate of interest absent the above mentioned statutory provisions.

[156]Mississippi House Journal, Reg. Sess. (1980) at 135.

signed to protect a lender's lien priority if the original contract rate of interest was increased when the loan was assumed. The language provided that the extension, renewal, or refinancing of an existing debt at an increased rate would not "constitute a novation of the debt and release of the security" unless the party so agreed in writing.[158] Even assuming the provision had survived, the problem involving novation would not have been entirely addressed. Most real estate loans are evidenced on forms created by federal government agencies active in the secondary market. These documents usually require the release of the original borrower and the substitution of the new borrower when the interest rate is increased. Whether substantial modification of the original security instrument in such instances causes its novation is not clear under the present law.

With respect to delinquent charges and prepayment penalties, subsection "10"[159] allows "a late payment charge not to exceed five dollars or 4% of the delinquent amount, whichever is greater," but the amount must be delinquent fifteen days before any charge is allowed.[160] Sub-section "12" of the act prescribes maximum prepayment penalties on any notes secured by residential real estate or on real estate used primarily for agricultural or livestock purposes.[161] However, the prescribed maximums do not apply where a greater penalty is allowed by any federal law or regulation.

Various sections concerning finance charge limitations for specified items and institutions are scattered throughout the Code. Many of these were also affected by the passage of the 1980 Interest Rate Act. The act contains provisions amending the Code provision[162] concerning the financing of motor vehicles[163] and commercial vehicles,[164] and provides that the maximum percentage rates must be calculated according to an actuarial method. For class I vehicles[165] the maximum rate is the

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[157]Mississippi Senate Journal, Reg. Sess. (1980) at 647.

[158]*Id.* at 651. This provision did not survive the joint conference. See Mississippi House Journal, Reg. Sess. (1980) at 1471.

[159]MISS. CODE ANN. § 75-17-1(10) (Supp. 1981).

[160]*Id.*

[161]MISS. CODE ANN. § 75-17-1(12) (Supp. 1981).

[162]MISS. CODE ANN. § 63-19-43 (Supp. 1981).

[163]MISS. CODE ANN. § 63-19-3(a) (Supp. 1981) defines a motor vehicle as "any self-propelled or motored device designed to be used or used primarily for the transportation of passengers or property, or both, and having a gross vehicular weight of less than fifteen thousand (15,000) pounds."

[164]MISS. CODE ANN. § 63-19-3(b) (Supp. 1981) defines a commercial vehicle as "any self-propelled or motored device designed to be used or used primarily for the transportation of passengers or property, or both, and having a gross vehicular weight of fifteen thousand (15,000) pounds or more."

[165]MISS. CODE ANN. § 63-19-43(a) (Supp. 1981) defines a class one vehicle as "[a]ny new motor vehicle manufactured in the same year or the year immediately prior to the year in which the sale is made."

greater of 14% per annum on the unpaid balance, or until June 30, 1982, the finance charge "may result in a yield not to exceed 5% per annum above the discount rate, excluding any surcharge thereon, on ninety-day commercial paper in effect at the federal reserve bank in the federal reserve district where the lender or the retail seller is located."[166] For class II vehicles[167] the maximum rate is 18.46% on the unpaid balance; however until June 30, 1982, the rate on unpaid balances may result in a yeild not to exceed 21% per annum.[168] The unpaid balance of the amount financed in connection with the sale or financing of a class III vehicle[169] may result in a yield not to exceed 26.75% per annum until June 30, 1982; thereafter, the maximum rate of interest for class III vehicles is 24% per annum.[170] Class IV vehicles[171] are allowed a maximum finance charge up to 28.75% per annum on the unpaid balance until June 30, 1982; following the 1982 cutoff date, the maximum rate of interest chargeable will be 26.75%.[172]

Installment loans bear a 6% rate of interest under the newly-amended Code.[173] This Code provision is explicitly subrogated in its application to any other code sections which specifically authorize a higher rate of interest for a particular type of loan, lender, or borrower.[174] Since these other provisions are numerous and extensive in their scope, this section's application will probably be infrequent.

CONCLUSION

Money as the common medium of exchange forms the life blood of any mature economic system. Access to sources of capital is vital to the

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[166] *Id.*

[167] MISS. CODE ANN. § 63-19-43(b) (Supp. 1981) defines a class two vehicle as:

> [a]ny new motor vehicle not in Class 1, any used motor vehicle manufactured not more than two (2) years prior to the year in which the sale is made, and any new commercial vehicle or used commercial vehicle manufactured not more than one (1) year prior to the year in which the sale is made.

[168] *Id.*

[169] MISS. CODE ANN. § 63-19-43(c) (Supp. 1981) defined a class three vehicle as "[a]ny used motor vehicle not in Class 2 and manufactured not more than (4) years prior to the year in which the sale is made and any used commerical vehicle not in Class 2."

[170] *Id.*

[171] MISS. CODE ANN. § 63-19-43(d) (Supp. 1981) defines a class four vehicle as "[a]ny used motor vehicle not in Class 2 or Class 3 and manufactured more than four (4) years prior to the year in which the sale is made."

[172] *Id.*

[173] MISS. CODE ANN. § 75-67-39 (Supp. 1981).

[174] For example, closed-end retail sales financed under a monthly payment plan would be controlled by the interest rates set out in MISS. CODE ANN. § 75-17-1(6). Likewise, when certain types of installment loans are made by state or national banks, the interest rates are governed by MISS. CODE ANN. § 81-5-79 (Supp. 1981). The purpose of § 75-67-39 seems to be that of a catch-all statute for those few types of installment loans not covered by specific provisions elsewhere.

formation of new capital and growth within that economy. This is true whether one is viewing the global economic structure or one state's economy.

The borrowing of money is one of the most important ways of obtaining access to capital; it is certainly the way which impacts directly on the most levels within our economic system. Government, both state and federal, is faced with the dilemma of protecting access to this source of money by insuring its continued profitability, while on the other hand weighing the social and individual costs of that profitability.

In passing the 1980 interest rate bill, the Mississippi legislature has attempted to update and modernize the state's approach to interest rate regulation. The new rates provide a degree of flexibility previously unknown in this state. Such flexibility is vital in the rapidly changing modern economy. Likewise, by attempting to tailor the usury provisions to complement the federal interest rate laws, the legislature has recognized the importance of interest rate legislation in determining Mississippi's status within the financial structure of the nation.

APPENDIX

PER ANNUM MAXIMUM FINANCE CHARGES ALLOWABLE BY LAW FOR LENDERS IN MISSISSIPPI

I. Loans Secured by Lien on Residential Real Property, Manufactured Mobile Homes or Stock in a Residential Housing Cooperative; DIDaMCA § 501; MISS. CODE ANN. §§ 75-17-1(3)(4), 81-5-79 (Supp. 1981) and 75-67-39 (Supp. 1981).

First Lien

1) If the lender is insured by the federal government or approved by HUD, or is an individual financing the sale of his principal residence, then any borrower may pay at a rate limited only by the market.° (If the state does act, see § (1) under "Second or Subsequent Lien").

Second or Subsequent Lien

1) Any lender may charge any borrower, through June 30, 1982, the greatest of 10%, 5% plus discount rate or 5% plus twenty year Bond Index; thereafter, the greater of 10% or 1% plus discount rate.°°

2) If the borrower is one described in MISS. CODE ANN. § 75-17-1(3) (Supp. 1980), any lender may, on loans greater than $2,500, charge, through June 30, 1982, the greatest of 15% per annum or 5% plus discount rate, or 5% plus twenty-year Bond Index; thereafter, the greater of 15% or 1% plus discount rate.°°

3) If lien is on a mobile home see Part III.

Any Lien (Add-On)

1) Any lender, through June 30, 1981, may charge any borrower the greatest of 7% add-on or 5% plus discount rate, or 5% plus twenty-year Bond Index if the loan is of the variety described in MISS. CODE ANN. § 75-17-1(4) (Supp. 1981); from June 30, 1981 through June 30, 1982, any lender may charge any borrower the greatest of 6% add-on, 5% plus discount rate or 5% plus twenty-year Bond Index if the loan is of the variety described in MISS. CODE ANN. § 75-17-1(4) (Supp. 1981); thereafter, the greater of 6% add-on or 1% plus discount rate. (If the lender is a bank or trust company organized under state law and doing business in this state or a national bank doing business in this state and the loan is in excess of $2,500, the permissible add-on is 12% until June 30, 1982; thereafter, it is 10%.)°°

° Providing the state does not act by April 1, 1983 to terminate the preemption; if not, the preemption is permanent.

°° Providing the state does not act at any time to terminate the federal preemption; if not, the preemption is permanent.

II. Unsecured Loans and Secured Loans other than Liens on the Residential Real Property: MISS. CODE ANN. §§ 75-17-1(1)(2)(3), 81-5-79 (Supp. 1981) and DIDaMCA § 511.

Before June 30, 1982

1) Any borrower may *agree* to pay the greater of 10% or 5% plus discount rate, otherwise 8% is the maximum rate.

2) Any partnership, joint venture, religious society, unincorporated association or corporation may pay, on loans greater than $2,500, the greater of 15% or 5% plus discount rate.

After June 30, 1982

1) Any borrower may pay 6% or *agree* to pay 10% per annum or 1% plus discount rate.*

2) Any borrower described in § 2) may pay, on loans greater than $2,500, the greater of 15% or 1% plus discount rate.*

Before April 1, 1983

1) Any borrower may, on business and agricultural loans over $1,000, pay 5% plus discount rate. (This section automatically self-destructs on the above date).

* Providing the bank is insured by the federal government and the state does not act to terminate the preemption; the preemption is permanent until the state so acts.

III. Loans Secured by Liens on Manufactured Mobile Homes (*See* Part I above for first liens on residential manufactured mobile homes where the loan meets the regulatory requirements of the Federal Home Loan Bank Board). MISS. CODE ANN. § 75-17-1(8) (Supp. 1981).

Any borrower may:

a) on that part of the amount financed that does not exceed $1,000, pay 25%;

b) on the part of the amount financed more than $1,000, but less than $2,500, pay 18%;

c) on that part of the amount financed more than $2,500, through June 30, 1982, pay 5% plus discount rate; thereafter, 15%.

IV. Loans Secured by Liens on Motor or Commercial Vehicles: MISS. CODE ANN. § 63-19-43 (Supp. 1981).

Any borrower may:

a) on new auto loans, through June 30, 1982, pay the greater of 14% or 5% plus discount rate; thereafter, 14%;

b) on loans on autos less than two years old, through June 30, 1982, pay 21%; thereafter, 18.46%;

c) on loans on autos two to four years old, through June 30, 1982, pay 26.75%; thereafter, 24%;

d) on loans on autos older than four years, through June 30, 1982, pay 28.75%; thereafter, 26.75%.

V. Add-on Installment Loans: MISS. CODE ANN. §§ 75-61-39, 81-5-79 (Supp. 1981).

Before June 30, 1981

Any lender may charge 7% add-on or the rates allowed under MISS. CODE ANN. § 75-17-1 (Supp. 1981).

Before June 30, 1982

If the lender is one described in MISS. CODE ANN. § 81-5-79 (Supp. 1981) and the loan is in excess of $2,500, then it may charge 12% add-on.

After June 30, 1981 but before June 30, 1982

Any lender, other than one described in MISS. CODE ANN. § 81-5-79 (Supp. 1981), may charge 6% add-on or the rates allowed by MISS. CODE ANN. § 75-17-1.

After June 30, 1982

A 10% add-on charge is allowed for lenders described in MISS. CODE ANN. § 81-5-79 (Supp. 1981) if the loan is in excess of $2,500; otherwise, a 6% add-on is allowed.

VI. Revolving Charge Accounts and Closed End Credit Sales: MISS. CODE ANN. § 75-17-1(5)(6) (Supp. 1981).

Revolving Charge Accounts

Through June 30, 1982, all retail sellers, lenders or users of credit cards may charge 1¾% per month on the daily balance of the account; thereafter, 1½% per month on that part of the balance below $800; 1¼% on that part of the balance between $800 and $1,200, and 1% per month on that part of the balance above $1,200.

Closed End Credit Sales

All retail sellers may charge 24% per annum on that part of the balance below $2,500 and 21% per annum on that part of the balance above $2,500.

VII. Miscellaneous Charges and Penalties

Late Payment

For delinquent installment payments (more than fifteen days past due), MISS. CODE ANN. § 75-17-1(10) (Supp. 1981), as amended, provides for a late payment charge of $5 or 4% of the delinquent amount, whichever is greater, except where the lender is a state chartered savings and loan association.

Prepayment Penalties°

MISS. CODE ANN. § 75-17-1(12) (Supp. 1981) prescribed limits for prepayment penalties on liens on real estate as follows:

a) 5% of the unpaid principal if prepaid in the first year;

b) 4% of the unpaid principal if prepaid in the second year;

c) 3% of the unpaid principal if prepaid in the third year;

d) 2% of the unpaid principal if prepaid in the fourth year;

e) 1% of the unpaid principal if prepaid in the fifth year;

f) No penalty if prepaid more than five years from date of the note.

*These limits do not apply where a greater penalty is required by federal law.

Minimum Charges

On loans under $2,500, lender may take a $10 minimum charge in lieu of interest on loans to be repaid in a single payment and a $15 minimum charge in lieu of interest on loans to be repaid in monthly installments.